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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KENNETH R. MELTON, Cross-Complainant and Appellant, v. LARRY BALLARD et al., Cross-Defendants and Respondents.	G040044 (Super. Ct. Nos. 06CC12145 & 06CC12155) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Affirmed.

DLA Piper US, Betty M. Shumener, Robert J. Odson and Bethany M. Palmer for Cross-Complainant and Appellant.

Jones Day, Richard S. Ruben, Craig E. Stewart, Darren K. Cottriel and Matthew A. Berliner for Cross-Defendants and Respondents.

* * *

Cross-complainant Kenneth R. Melton was one of three members of Eagle Real Estate Management Group, LLC (Eagle Management), which managed a real estate investment enterprise, Eagle Real Estate Group, LLC (Eagle Real Estate), specializing in using tax exempt bonds to finance the acquisition and renovation of large apartment complexes offering affordable housing units. Cross-defendants Larry Ballard, David Conant, Wyn Holmes, Kyle Martin, Jose Sanchez, David Whitmore, Lee Brockett, Robert Zeltner and United Financial Group, Inc., are passive investors in Eagle Real Estate. After several years of business success, Melton reached agreement with the other members of Eagle Management that allowed him to reduce his involvement in Eagle Management, and pursue a competing business. After efforts to purchase most or all of Melton's interest in Eagle Management proved fruitless, the other two members locked Melton out of the business. After Melton and the other two Eagle Management members sued each other, respondents executed an amendment to the Eagle Real Estate operating agreement replacing Eagle Management with a similar enterprise that excluded Melton.

Melton sued respondents, alleging that by replacing Eagle Management as manager of Eagle Real Estate, they interfered with Melton's prospective economic advantages as to future real estate projects, interfered with the Eagle Management operating agreement, and aided and abetted the breach of fiduciary duties by the other two members of Eagle Management. He also alleged that the participation of certain respondents in the establishment of a bank also interfered with the Eagle Management operating agreement and aided and abetted the breach of fiduciary duty by one of Melton's partners because those respondents diverted that partner's attention away from Eagle Management's business. The trial court sustained demurrers without leave to amend as to Melton's interference with prospective advantage claim, and granted summary judgment on the remaining two claims.

We conclude the trial court did not err in sustaining respondents' demurrer without leave to amend. Melton failed to allege any opportunities lost by respondents'

actions. Moreover, the only wrongful conduct Melton identified supporting the interference claim were the torts alleged in the other two causes of action. Accordingly, any error in sustaining the demurrers was harmless.

We also conclude the trial court did not err in granting summary judgment on Melton's interference with contract and aiding and abetting breach of fiduciary duty claims. Melton provided no evidence establishing respondents' knowledge of the current terms of Eagle Management's operating agreement, or the informal agreement allowing Melton to pursue competing activities. Accordingly, Melton failed to raise a triable issue of fact whether respondents had the requisite knowledge and intent to interfere with the Eagle Management agreement or aid and abet a breach of fiduciary duty. We therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In May 2000, Melton and Randall J. Friend founded Eagle Management and Eagle Real Estate. Eagle Management's sole business was to manage Eagle Real Estate. Eagle Management and Eagle Real Estate specialized in utilizing tax exempt bond financing to acquire and renovate large apartment complexes that offered a certain percentage of affordable housing units. Under their business plan, Eagle Management identified large apartment projects for Eagle Real Estate to acquire and renovate, and then refinance or sell them for profit.

Eagle Management is governed by the Eagle Management Operating Agreement (Management Agreement), and Eagle Real Estate is governed by the Eagle Real Estate Group, LLC, Operating Agreement (Real Estate Agreement). Melton and Friend each owned a 45 percent interest in Eagle Management and H. Gordon MacKenzie, since 2003, owned the remaining 10 percent interest. Eagle Management

owned a 73 percent interest in Eagle Real Estate, with respondents holding nearly all of the remaining 27 percent interest. Respondents hold no interest in Eagle Management.

As the exclusive manager of Eagle Real Estate, Eagle Management was entitled to receive acquisition fees, disposition fees, asset management fees, construction inspection, contract oversight and administration fees (Management Fees**)** from each apartment property Eagle Real Estate acquired. As a member owning a 73 percent interest in Eagle Real Estate, Eagle Management also received a pro rata share of distributions to Eagle Real Estate members. Each member of Eagle Management played a distinct role in the business. Friend was the Director of Acquisitions, responsible for locating property and investors. Melton specialized in handling the financial aspects associated with tax exempt bond financing, refinancing, management and sale of the projects. MacKenzie oversaw renovation of the projects.

In April 2006, Melton informed Friend and MacKenzie he wanted to change his status with Eagle Management so he could purchase income producing properties through his own company. According to Melton, Friend and MacKenzie reached an informal agreement authorizing Melton to proceed. Melton informed the Eagle Real Estate staff of the agreement and explained he would cut back his work hours. Friend and MacKenzie proposed that Melton sell them part of Melton's interest in Eagle Management, reducing Melton's interest from 45 percent to 10 percent. Friend and MacKenzie further proposed to purchase Melton's remaining 10 percent interest once Melton left Eagle Management completely.

From April to November 2006, the parties negotiated the price at which Friend and MacKenzie would purchase some or all of Melton's 45 percent interest in Eagle Management. In late 2006, the dispute over the amount to be paid escalated, and Friend and MacKenzie accused Melton of misappropriating Eagle Real Estate's trade secrets and purchasing Eagle Real Estate opportunities for his separate business. On November 3, 2006, Friend and MacKenzie had Melton escorted from the office of Eagle

Real Estate and locked him out. Two weeks later, Eagle Real Estate and Eagle Management sued Melton for, inter alia, breach of contract, breach of fiduciary duty, misappropriation of trade secrets, interference with prospective economic advantage, conversion, and unfair competition. Friend and MacKenzie later joined the action as plaintiffs. On November 20, 2006, Melton filed a separate suit against Friend and MacKenzie for breach of fiduciary duty. The two actions were consolidated into the present action.

After being locked out, Melton exercised his rights under an "auction process" set forth in the Eagle Management Agreement to determine and obtain the fair value of his interest. Under this provision, a disaffected member of Eagle Management may send a notice to the other members with a stated price and terms by which the disaffected member is willing to purchase the interests of the other members. The other members then have the option to purchase the disaffected member's interest on the same terms. If they do not exercise this option, the disaffected member may then purchase the other members' shares. Friend and MacKenzie did not respond to Melton's offer as required under the agreement.

Shortly after the lawsuits were filed, Friend and MacKenzie organized Eagle Real Estate Management Group II, LLC (Eagle Management II), with themselves as sole members. Friend and MacKenzie also prepared two amendments to the Real Estate Operating Agreement, the fifth and sixth amendments, and presented it to respondents for execution. The fifth amendment included a provision in which the members of Eagle Real Estate would waive their existing right of first refusal on any transfer of interest in Eagle Real Estate, thus allowing Eagle Management II to replace Eagle Management as majority shareholder of Eagle Real Estate without having to offer Eagle Management's interest in Eagle Real Estate to respondents. The sixth amendment replaced Eagle Management with Eagle Management II for any property purchased after

January 1, 2007. As one of the respondents explained, the purpose of the sixth amendment was to provide a "stopping point" for Melton's rights on future projects.

After respondents executed the fifth and sixth amendments, Melton filed an amended cross-complaint naming respondents. Melton's second amended cross-complaint alleged three causes of action against respondents: (1) the third cause of action for aiding and abetting the breach of fiduciary duty; (2) the seventh cause of action for interference with contract; and (3) the eighth cause of action for interference with prospective economic advantage. The cross-complaint alleged respondents' execution of the fifth and sixth amendments facilitated the efforts of Friend and MacKenzie to strip Melton of his indirect interest in Eagle Real Estate, in violation of the Eagle Management Agreement and Friend and MacKenzie's fiduciary duties.

The cross-complaint also alleged that certain of the respondents, Zeltner, Holmes, Ballard, and Conant (bank respondents), induced Friend to breach his obligation under the Management Agreement to devote his full attention to Eagle Management by offering Friend warrants and stock options in exchange for his participation in the formation of First Western Corporation and it anticipated successor, Southern California National Bank. The cross-complaint alleged that Friend spent so much time on establishing the bank that Eagle Real Estate's acquisition of new properties came to a standstill. The cross-complaint also alleged that respondent Zeltner requested Friend have Eagle Real Estate purchase office equipment for the new bank, which included a computer.

The trial court sustained respondents' demurrers to the eighth cause of action, for interference with prospective economic advantage, without leave to amend. The trial court observed that the acts alleged in the eighth cause of action were no different from the seventh cause of action, for interference with contract. The court also noted the damages alleged were speculative.

The trial court later granted summary judgment on the third and seventh causes of action. The court observed that no evidence was introduced demonstrating respondents colluded with anyone or "knew what was going on . . . that there was a breach of fiduciary duty by anyone . . . ." Melton now appeals the trial court's rulings on the demurrers and summary judgment.

II

DISCUSSION

A. *The Trial Court Did Not Err in Sustaining Respondents' Demurrer to the Eighth Cause of Action for Interference with Prospective Economic Advantage, Without Leave to Amend*

We review de novo the trial court's order sustaining a demurrer. (*Bardin v. DaimlerChrysler Corp*. (2006) 136 Cal.App.4th 1255, 1263.) "In doing so, we assume the truth of all properly pleaded facts and consider any judicially noticed documents. [Citation.] We give the complaint a reasonable interpretation and determine whether it states facts sufficient to constitute a cause of action under any legal theory. [Citation.] We review denial of leave to amend for abuse of discretion. [Citation.]" (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 463.)

To state a cause of action for interference with prospective economic advantage, the pleader must allege "the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. This tort therefore 'protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.'" (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1164-1165 (*Korea Supply*).) In the cross-complaint, Melton alleges that by executing the fifth and sixth amendments and "otherwise colluding with Friend and MacKenzie to deprive Melton of the benefit of the bargain under the Eagle Management

[] Agreement, cross-defendants have interfered with the prospective economic advantage that Eagle Management and Melton would have received with respect to prospective investments made by Eagle [Real Estate] and the Project Companies, to the detriment of Melton."

The cross-complaint is ambiguous in identifying the third party with whom Melton had an economic relationship. If the third party is Eagle Management or Eagle Real Estate, the relationship is contractual, making this cause of action superfluous. If the third parties are sellers of apartment complexes, then Melton has failed to plead the cause of action with requisite specificity because he fails to identify in his cross-complaint or opening brief any proposed new projects Eagle Real Estate considered for investment, either at the time or after respondents executed the fifth and sixth amendments.[1] True, Melton had received financial benefits as a result of Eagle Real Estate's past investments. But at the time respondents executed the fifth and sixth amendments to the Real Estate Agreement, the prospect of Melton receiving future economic benefits from prospective Eagle Real Estate projects was unlikely at best. At that point in time, Friend and MacKenzie had locked Melton out of the office, and Melton had instituted the auction process to either buy out Friend and MacKenzie, or have Friend and MacKenzie buy Melton out. Thus, the cross-complaint merely alleges a "'speculative expectation that a potentially beneficial relationship will arise.'" (See *Korea Supply, supra,* 29 Cal.4th at p. 1164.) We conclude this is insufficient to state a cause of action for interference with prospective economic advantage.

Even if we concluded the cross-complaint adequately alleged the probability of future economic benefit, we would not reverse the trial court's ruling. To

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[1] In his reply brief, Melton identifies prospective investments in Victorville and Texas, and cites evidence that Eagle Management II claims to have earned over $227,818 in fees from prospective investments. This evidence is outside of the pleadings and improperly raised for the first time in reply. Accordingly, we do not consider it in our analysis.

state a cause of action for interference with economic advantage, the pleader also must allege that the conduct causing the interference was wrongful by some legal measure other than the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.) Melton asserts this pleading requirement is met because respondents' acts also constituted aiding and abetting breach of fiduciary duty and interference with contract, both independently wrongful torts. But, as discussed *post*, we conclude Melton did not raise a triable issue of fact that respondents engaged in either of these torts. Accordingly, any error by the trial court in sustaining respondents' demurrers to Melton's interference with economic advantage claim was harmless. (See *Teresi v. State of California*. (1986) 180 Cal.App.3d. 239, 245, fn. 4 [error in sustaining demurrer harmless where claim is legally untenable]; see also *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1309.)

B. *Melton Has Standing to Bring Most of His Claims*

After the trial court granted summary judgment, Melton, Friend, and MacKenzie settled the dispute between them on the record, with a payment of $3.2 million to Melton in exchange for his interest in Eagle Management. We granted respondents' unopposed motion to augment the record with the transcript of the settlement.[2] Although the parties expressly stated on the record that the settlement would not affect this appeal, Melton agreed his interest in Eagle Management would end as of December 31, 2006. Respondents contend any alleged harm caused by their actions directly affected Eagle Management, and that any harm Melton suffered was derivative. Because Melton no longer has any interest in Eagle Management, respondents reason he lacks standing to bring this action. For the most part, we disagree.

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[2] In addition to the motion to augment, respondents request we grant judicial notice of certain of the parties' agreements, including the written settlement agreement. For the reasons stated in Melton's opposition, we deny the request.

The general rule of derivative actions has been summarized thus: "A shareholder's derivative suit seeks to recover for the benefit of the corporation and its whole body of shareholders when injury is caused to the corporation that may not otherwise be redressed because of failure of the corporation to act. Thus, 'the action is derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.' [Citations.] '. . . The stockholder's individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' [Citation.]" (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107.)

"In *Jones*, *supra*, 1 Cal.3d 93, our Supreme Court recognized an exception to the requirement that a shareholder must bring a derivative action in the name of the corporation. It held that if a minority stockholder was bringing suit against the majority stockholders for breach of fiduciary duty, 'an individual cause of action exists' because the injury was 'not incidental to an injury to the corporation.' [Citation.]" (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964 (*PacLink*).)

Although it is true Eagle Management suffered harm when removed as Eagle Real Estate's manager, to require Eagle Management to bring the action would exalt form over substance. In form, Eagle Management II replaced Eagle Management as manager of Eagle Real Estate. But in substance, the transaction did nothing more than remove Melton from Eagle Management. In other words, Melton was the only member of Eagle Management harmed by Friend and MacKenzie's acts. Because Melton's injury was "'not incidental to an injury to the corporation,'" (*PacLink, supra,* 90 Cal.App.4th at p. 964), Melton has standing to sue for injures sustained from the fifth and sixth amendments.

Moreover, Melton has standing to sue regarding Friend's participation in First Western. By participating in the First Western project, Friend allegedly violated a provision of the Management Agreement, to which Melton was a party. Being a party to the agreement, he would have standing to enforce a claim for interference with it. But Melton lacks standing to claim that respondents requested Friend to use Eagle Real Estate assets in starting up First Western. The injury complained of does not arise out of a breach of the Management Agreement, but is an injury to Eagle Real Estate. Melton is harmed by First Western's use of Eagle Real Estate assets only as a part owner of Eagle Management, which is a part owner of Eagle Real Estate. The injury is not personal to Melton, but merely incidental. Accordingly, we conclude Melton cannot recover for the bank respondent's alleged use of Eagle Real Estate's assets.

C. *The Trial Court Did Not Err in Granting Summary Judgment*

1. Aiding and Abetting Breach of Fiduciary Duty

Summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden of showing that "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes this showing, the burden then shifts to the plaintiff to show by admissible evidence that a triable issue of material fact exists. (*Ibid.*) We independently review the trial court's decision. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

Here, the trial court granted summary judgment on Melton's third cause of action for aiding and abetting breach of fiduciary duty, and seventh cause of action for interference with contract. Melton contends the trial court erred in granting summary judgment. We disagree.

"California courts have long held that liability for aiding and abetting depends on proof the defendant had *actual knowledge of the specific primary wrong* the defendant substantially assisted." (*Casey v. U.S. Bank Nat. Assn*. (2005) 127 Cal.App.4th 1138, 1145-1146, italics added.) In other words, "'aiding and abetting . . . necessarily requires a defendant to reach a *conscious decision to participate in tortious activity* for the purpose of assisting another in performing a wrongful act.'" (*Ibid.*) "A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' [Citation.] Of course, *a defendant can only aid and abet another's tort if the defendant knows what 'that tort' i*s." (*Ibid.*, italics added.)

The trial court expressed its view that Melton failed to provide any evidence demonstrating respondents "knew what was going on . . . that there was a breach of fiduciary duty by anyone . . . ." To demonstrate respondents' knowledge of the purported breach of fiduciary duty by Friend and MacKenzie, Melton relies on testimony by respondent Martin who said he understood the purpose of the sixth amendment was "[t]o kind of preserve the stopping point for whatever rights, I guessed, that [Melton] may have, . . . and then going forward, it would be just [Friend] and [MacKenzie] because [Melton] was no longer going to part of the future deals. He wouldn't be signing on the loans, and that type of thing." Melton also cites the testimony of respondent Conant who testified he understood the purpose of the sixth amendment was to "draw a line . . . prior to this period, [Melton] would have had involvement, and after that period, it would be going forward without his involvement."

We conclude the testimony Melton cites fails to demonstrate respondents knew that replacing Eagle Management with Eagle Management II would violate the fiduciary duties Friend and MacKenzie owed to Melton. Respondents were passive investors in Eagle Real Estate. Indeed, the individual respondents' ownership interest in

Eagle Real Estate is relatively insignificant, with Ballard owning 0.5 percent, Brockett owning 2.0 percent, Conant owning 1.5 percent, Holmes owning 0.5 percent, Martin owning 1.0 percent, Sanchez owning 0.167 percent, Whitmore owning 0.167 percent, and Zeltner owning 0.5 percent. In recognition of respondents' status as passive investors, the Real Estate Agreement specifically provides that, with limited exceptions, respondents "shall have no power to participate in the management of the Company . . . ." None of respondents were parties to the Eagle Management Agreement at the time they executed the fifth and sixth amendments, and no evidence suggests they had familiarity with the current Management Agreement's terms. True, one of the respondents, Martin, had previously been a party to that agreement, but he had ceased being a member of Eagle Management years before. Significantly, months before the fifth and sixth amendments were executed, Melton told respondents he had reached an agreement with Friend and MacKenzie allowing him to build his own business investing in income producing properties separate and apart from Eagle Real Estate, and that he would be reducing his involvement in Eagle Real Estate. Nothing in the record demonstrates that respondents were aware of the terms of the new agreement. Moreover, when the fifth and sixth amendments were executed, Melton had been locked out by his partners, and Melton had made a demand to buy out his partners, or to have them purchase his interest. Given these facts, it would have been manifestly clear to respondents that Melton would not participate in future projects. Friend and MacKenzie's request that respondents amend the Real Estate Agreement to reflect this fact would not put respondents on notice they were aiding and abetting a breach of fiduciary duty.

Similarly, no evidence suggests the bank respondents knew that involving Friend in the startup of First Western breached his fiduciary duty to Melton. To demonstrate a breach of fiduciary duty with respect to the First Western matter, Melton cites the provisions of the Management Agreement. For example, section 5.7 of the Operating Agreement provides: "The Members shall not engage in any other business

activity requiring a substantial commitment of such Member's time, and shall devote their full time and business efforts to [Eagle Management] . . . ." Melton asserts the bank respondents induced Friend to abandon his responsibilities to Eagle Management by offering Friend warrants and stock options in the bank if Friend devoted his time and efforts to help ensure that the bank would receive its charter.

But Melton introduced no evidence demonstrating the bank respondents were aware of this provision of the Management Agreement, or that they had any reason to believe Friend's participation in First Western was not authorized by MacKenzie and Melton. For example, nothing demonstrates the bank respondents took steps to hide Friend's involvement in First Western from Melton. One would hardly suspect that merely soliciting someone's assistance in starting a new business would give rise to tort liability.

2. Interference with Contractual Relations

Similar to aider and abettor liability, tort liability for interference with contractual relations requires "defendant's knowledge of this contract [and] defendant's intentional acts designed to induce a breach or disruption of the contractual relationship." (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 55.) Again, no evidence demonstrates respondents had any knowledge of the terms of the operative contract governing the relationship between Melton, Friend, and MacKenzie. Indeed, by the time of these amendments, Friend and MacKenzie had locked Melton out of the business, and the two sides were enmeshed in litigation. Consequently, it is difficult to understand how respondents could have disrupted the relationship any further. Also, nothing demonstrates bank respondents knew enlisting Friend's assistance in starting up First Western would lead to a breach of the Management Agreement.

In sum, Melton's failure to produce evidence of respondents' wrongful acts suggests Melton simply used them as pawns in a litigious chess game between him and

his two partners. We conclude the trial court properly recognized they did not belong in this litigation, and granted them appropriate relief.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.